Tenaswari a/p Rajen & Anor (as administrators for the estate of Thinagaran a/l Madhavan, the deceased and in their own capacity as the deceased's dependants) v Kepten Maritim Mohammad Rosli bin Kassim (Pengarah Maritim Negeri Ibu Pejabat Maritim Negeri Selangor) & Ors

HIGH COURT (SHAH ALAM) — WRIT OF SUMMONS NO BA-21NCVC-24–05 OF 2020
ALICE LOKE J
28 JULY 2025

Tort — Negligence — Duty of care — Death of detainee ('deceased') by way of suicide whilst under custody — Plaintiffs as wife and father of deceased commenced suit against defendants for negligence, public misfeasance and vicarious liability — Whether defendants owed duty of care to ensure safety of deceased whilst in custody — Whether defendants breached duty of care — Whether duty of care ceased to exist as it was not foreseeable that deceased would commit suicide — Whether deceased's death a voluntary act of deceased that broke chain of causation between defendants' breach and death of deceased — Whether defence of novus actus interveniens applied — Whether there was contributory negligence on part of deceased — Whether there was sufficient evidence to support claim for misfeasance in public office — Whether Government of Malaysia could be held vicariously liable — Whether damages and compensation should be awarded

The present action, founded on negligence, breach of statutory duty and misfeasance in public office, was brought by the plaintiffs, the wife and father of the deceased, who died tragically by committing suicide whilst he was detained in the custody of the defendants. This suit was brought in the plaintiffs' capacity as dependants under s 7 of the Civil Law Act 1956 ('the CLA'), and also as co-administrators of the estate of the deceased under s 8 of the CLA. In addition, the plaintiffs also brought this suit in their personal capacity. The first defendant was the Director of the Selangor Maritime Enforcement Agency Malaysia ('MEAM') office at the material time. He was in charge of the entire operations and security of the lock-up, particularly the implementation of lock-up procedures to ensure the safety of detainees. The second defendant was the investigating officer in respect of the crime the deceased was detained. The third defendant, the Government of Malaysia was cited as an employer vicariously liable for the actions and omissions of the first and second defendant, and other of its officers and servants pursuant to ss 5 and 6 of the Government Proceedings Act 1956. On 9 January 2019, some officers from the MEAM were patrolling the waters off the coast of the state of Selangor. Upon keeping a lookout, they sighted the boat which was being

A driven in a suspicious manner. After a chase, they succeeded in apprehending the boat. On the boat was the deceased, and another person named Inthiran. On their boat, some packages, later tested to be drugs, were found. Both the deceased and Inthiran taken into custody and were produced before the magistrate later at night for a remand order for the purpose of an investigation B under s 39B of the Dangerous Drugs Act 1952. The magistrate ordered for both the detainees to be remanded for a period of seven days at the lock-up of the MEAM office. Four days later, the lifeless body of the deceased was found hanging from the ceiling of the lock-up. At the material time, the lock-up was monitored through a CCTV. Upon viewing the CCTV, it was found that the C deceased had hung the pants from a grill on the ceiling. This attire was provided to him whilst he was in the lock-up. He then stepped on a partial concrete wall in the lock-up in order to hang himself from the pants. The essence of the plaintiffs' complaint was that: (a) the defendants owed a duty of care to ensure the safety of the deceased whilst he was in their custody, which they failed to do; D (b) the defendants breached their statutory duty in failing to comply with the rules and law pertaining to the detention of the deceased in a lock-up; (c) the office of the MEAM was not a designated lock-up at the material time; and (d) there was misfeasance in public office on the part of both the first and second defendant, and servants of third defendant. On the contrary, the E defendants argued that: (i) they owe no duty of care to the deceased as it was not foreseeable that the deceased would commit suicide; and (ii) the deceased's death was not caused by their negligence but by the voluntary act of the deceased which broke the chain of causation between the defendants' breach and the death. The issues that arose for determination were: (A) in view of the F issue raised by the defence that the deceased's death was not foreseeable, whether a duty of care existed; (B) whether the defendants were in breach of the duty of care; (C) whether the defence of novus actus interveniens applied in the circumstances of this case; (D) whether the deceased was contributorily negligent; and (E) whether the evidence presented by the plaintiffs supported G the plaintiffs' claim for breach of statutory duty and public misfeasance.

Held, allowing the plaintiffs' claim in part:

(1) As a detainee, the deceased was in the custody and care of the defendants H and/or their officers. He had been detained pursuant to a remand order obtained by the investigating officer. His liberty was curtailed for the duration of the remand period. His movements were under the control and close supervision of the defendants. In view of this, the ingredient of sufficient proximity of relationship had been established to give rise to a I duty of care (see para 37).

(2) Duty of care on the part of the defendants to take reasonable care of the deceased extended not only to preventing harm caused by third parties, but by the deceased inflicting self-harm. Judicial notice could be taken of the fact that persons in custody were susceptible to mental stress from

being in custody. They were vulnerable to depression and hence suicidal impulses was not unforeseeable. The deceased here was arrested and detained for investigation into a drug trafficking offence. One could expect him to be under extreme mental distress from the fact of being detained for a capital offence. It was not unforeseeable that he would be a suicide risk. Therefore, it was not open for the defendants to argue that a duty of care was not owed to the deceased at the material time (see paras 40 & 44–45)

(3) It was in evidence that when the deceased was placed in the lock-up, he was provided with two pairs of pants. It was negligent on the part of the defendants to have provided the deceased the spare pants. Whilst pants as an attire and ordinarily innocuous and harmless, it had the potential of being dangerous when provided to a detainee. The defendants were obviously not alert to the possibility of this piece of clothing being used by the deceased to harm himself. It was unfathomable for the deceased to be provided with another set of pants only to be used as a pillow. It would appear that there was a careless disregard of the potential harm to which this attire could be put to (see paras 48 & 50).

(4) A further reason not to have provided the deceased with the extra pair of pants was the presence of a grill, which ought to have raised a red flag. The defendants obviously overlooked this. They should have taken steps to avoid exposing the deceased to any danger. Therefore, the defendants created the risk of harm to the deceased by failing to take reasonable care by providing him with the second pair of pants which then gave him the opportunity to commit the fatal act. In the circumstances, the defendants had breached their duty of care (see paras 52–53).

(5) Had there been continuous monitoring of the CCTV, or at the very least at shorter intervals than the hourly intervals, the deceased could have been prevented from carrying out the suicide. Monitoring at hourly intervals defeated the purpose of having a CCTV. It was installed for continuous monitoring. It made no sense to view the CCTV only hourly as DW3 was already conducting regular patrolling of the lock-up. The CCTV monitoring must therefore supplement the regular patrolling. The lack of closer monitoring caused DW4 and those on duty with him to miss the entire actions of the deceased just prior to his suicide (see paras 56–58).

(6) The defendants had failed in taking reasonable care to prevent the death of the deceased. There was a clear breach of duty when the deceased was with an extra pair of pants in the presence of a grill in the lock-up and where the risk of suicide was not unforeseeable with detainees. Coupled with this was the lack of monitoring which could have prevented the

A deceased from successfully carrying out his intention to commit suicide. In the circumstances, the defendants were liable in negligence (see paras 59–60).

(7) The defendants were under a duty of care to ensure the deceased came to no harm whilst in their custody. His death was the very event their duty was directed at. It was not therefore open to the defendants to contend that the actions of the deceased broke the chain of causation. The act of the deceased did not constitute an independent intervening act as it flowed from the breach of the defendants (see para 64).

(8) The court was not persuaded by the defence's submission that liability ought to be apportioned as the deceased ought to be responsible taking his own life. The deceased was in a position of extreme mental stress as he was detained for alleged drug trafficking and faced the possibility of the death penalty, if convicted. It would be unconscionable to expect the deceased to bear some part of the blame for his death especially when the defendants own actions afforded him an opportunity to take his own life. But for the defendants' negligence, the plaintiff would not have committed suicide. Therefore, the defence of contributory negligence was rejected (see para 65).

(9) From the pleading, there was at best, a vague reference to breach of statutory duty. The law upon which the duty was said to arise was not mentioned. The plaintiffs were bound by their pleadings and ought not to be allowed to raise an unpleaded point in submission. The plaintiffs could not be allowed to take the defendants by surprise on an unpleaded fact. For this reason, the court refrained from considering this point as it would be tantamount to a denial of justice to the defendants who were not allowed to respond by evidence led on their behalf (see paras 67–68 & 70).

(10) There was no credible evidence from the plaintiffs own case to substantiate the allegations of misfeasance in public office. Bearing in mind the ingredients of the tort of misfeasance in public office, the evidence did not even suggest remotely a case of misfeasance in public office. In the result, the plaintiffs to had succeeded only in establishing their case in negligence. The defendants were, thus, ordered to pay the plaintiffs: (a) special damages RM6370; (b) funeral expenses RM5,000; (c) bereavement (first plaintiff only) RM10,000; and (d) loss of earnings RM172,800; (in the proportion of 80:20, for the benefit of the first plaintiff and her three children, and second plaintiff and his wife respectively) (see paras 71, 74 & 88).

(11) The first and second defendants, whilst they were not the actual tortfeasors as their duties did not include patrolling and monitoring the deceased at the material time, they were superior officers who had

authority over the well-being of the deceased. The first defendant as the State Maritime Director, was responsible for the entire operations and security of the maritime office. The second defendant had authority over the deceased as she was the investigating officer. Hence, this was a case of systemic failure, for which the superior officers were to be held responsible (see para 75).

[Bahasa Malaysia summary

Tindakan semasa ini, yang berasaskan kepada kecuaian, pelanggaran kewajipan berkanun dan salah laku dalam jawatan awam, telah dikemukakan oleh plaintif-plaintif, iaitu isteri dan bapa kepada si mati, yang telah meninggal dunia secara tragik dengan membunuh diri ketika beliau ditahan di dalam jagaan defendan-defendan. Tindakan ini telah dibawa oleh plaintif-plaintif dalam kapasiti mereka sebagai tanggungan di bawah s 7 Akta Undang-Undang Sivil 1956 ('AUS'), dan juga sebagai pentadbir bersama kepada harta pusaka si mati di bawah s 8 AUS. Di samping itu, plaintif-plaintif juga telah membawa tindakan ini dalam kapasiti peribadi mereka sendiri. Defendan pertama pada masa material merupakan Pengarah Pejabat Agensi Penguatkuasaan Maritim Malaysia Negeri Selangor ('APMM'). Beliau bertanggungjawab ke atas keseluruhan operasi dan keselamatan lokap, khususnya pelaksanaan tatacara lokap bagi memastikan keselamatan tahanan. Defendan kedua merupakan pegawai penyiasat berhubung dengan kesalahan yang mana si mati telah ditahan. Defendan ketiga, Kerajaan Malaysia, telah dinamakan sebagai majikan yang bertanggungjawab secara vikarious terhadap tindakan dan peninggalan defendan pertama dan kedua, serta pegawai dan kakitangannya yang lain menurut ss 5 dan 6 Akta Prosiding Kerajaan 1956. Pada 9 Januari 2019, beberapa pegawai daripada APMM telah membuat rondaan di perairan berhampiran pesisir negeri Selangor. Semasa menjalankan pengawasan, mereka telah ternampak sebuah bot yang sedang dipandu dalam keadaan mencurigakan. Selepas satu kejar-mengejar, mereka berjaya menahan bot tersebut. Di atas bot itu terdapat si mati dan seorang lagi individu bernama Inthiran. Di atas bot tersebut, beberapa bungkusan telah dijumpai, yang kemudiannya disahkan sebagai dadah. Kedua-dua si mati dan Inthiran telah ditahan dan kemudiannya dibawa ke hadapan majistret pada waktu malam bagi mendapatkan perintah reman untuk tujuan siasatan di bawah s 39B Akta Dadah Berbahaya 1952. Majistret telah memerintahkan agar kedua-dua tahanan direman selama tujuh hari di lokap pejabat APMM. Empat hari kemudian, mayat si mati telah dijumpai tergantung dari siling lokap dalam keadaan tidak bernyawa. Pada masa material, lokap tersebut dipantau melalui sistem CCTV. Setelah rakaman CCTV diteliti, ianya didapati bahawa si mati telah menggantungkan seluarnya pada jeriji siling. Pakaian tersebut telah dibekalkan kepadanya semasa berada dalam lokap. Si mati kemudiannya memanjat dinding separuh konkrit di dalam lokap untuk menggantung diri menggunakan seluar tersebut. Inti pati aduan plaintif-plaintif ialah bahawa: (a) defendan-defendan mempunyai tugas berhati-hati untuk memastikan

keselamatan si mati semasa beliau berada dalam tahanan mereka, yang mana mereka telah gagal menunaikannya; (b) defendan-defendan telah melanggar kewajipan berkanun dengan tidak mematuhi peraturan dan undang-undang berkaitan penahanan si mati di dalam lokap; (c) pejabat APMM bukanlah lokap yang diwartakan sebagai sah pada masa material; dan (d) terdapat salah laku dalam jawatan awam oleh defendan pertama dan kedua serta pegawai defendan ketiga. Sebaliknya, defendan-defendan berhujah bahawa: (i) mereka tidak mempunyai sebarang tugas berhati-hati terhadap si mati kerana tidak dapat dijangka bahawa si mati akan membunuh diri; dan (ii) kematian si mati bukanlah akibat kecuaian mereka tetapi berpunca daripada tindakan sukarela si mati sendiri yang memutuskan rantaian kausa antara pelanggaran defendan-defendan dan kematian tersebut. Isu-isu yang timbul untuk ditentukan ialah: (A) dengan mengambil kira isu yang dibangkitkan oleh pihak pembelaan bahawa kematian si mati tidak dapat dijangka, sama ada tugas berhati-hati wujud; (B) sama ada defendan-defendan telah melanggar tugas berhati-hati tersebut; (C) sama ada pembelaan novus actus interveniens terpakai dalam keadaan kes ini; (D) sama ada si mati telah menyumbang kepada kecuaiannya sendiri; dan (E) sama ada keterangan yang dikemukakan oleh plaintif-plaintif menyokong tuntutan mereka berhubung pelanggaran kewajipan berkanun dan salah laku dalam jawatan awam.

Diputuskan, membenarkan tuntutan plaintif sebahagiannya:

(1) Sebagai seorang tahanan, si mati berada dalam jagaan dan kawalan defendan-defendan dan/atau pegawai-pegawai mereka. Beliau telah ditahan berdasarkan perintah reman yang diperoleh oleh pegawai penyiasat. Kebebasan dirinya telah disekat sepanjang tempoh reman tersebut. Segala pergerakannya berada di bawah kawalan dan pengawasan rapi defendan-defendan. Maka, unsur hubungan rapat telah wujud bagi menimbulkan kewajipan tugas berhati-hati (lihat perenggan 37).

(2) Tugas berhati-hati oleh defendan-defendan untuk mengambil langkah munasabah terhadap si mati meliputi bukan sahaja pencegahan bahaya yang disebabkan oleh pihak ketiga, tetapi juga bahaya yang disebabkan oleh si mati sendiri. Mahkamah boleh mengambil pengetahuan kehakiman bahawa tahanan sering terdedah kepada tekanan mental semasa dalam tahanan. Mereka mudah terdedah kepada kemurungan dan oleh itu dorongan untuk membunuh diri bukanlah sesuatu yang tidak dapat dijangka. Si mati dalam kes ini telah ditahan untuk disiasat atas kesalahan pengedaran dadah. Seseorang boleh menjangkakan si mati berada di bawah tekanan mental yang melampau atas fakta ditahan kerana kesalahan besar. Ia tidak dijangka bahawa dia akan menjadi risiko bunuh diri. Oleh itu, ia adalah tidak terbuka bagi defendan untuk berhujah bahawa tugas berhati-hati tidak terhutang kepada si mati pada masa material (lihat perenggan 40 & 44–45).

(3) Keterangan menunjukkan bahawa apabila si mati dimasukkan ke dalam lokap, beliau telah dibekalkan dengan dua helai seluar. Ia adalah kecuaian di pihak defendan-defendan dalam membekalkan seluar tambahan kepada si mati. Walaupun seluar merupakan pakaian biasa yang tidak berbahaya, namun ia berpotensi digunakan sebagai alat berbahaya oleh tahanan. Defendan-defendan jelas gagal berwaspada terhadap kemungkinan bahawa pakaian tersebut boleh digunakan oleh si mati untuk mencederakan dirinya sendiri. Ia adalah tidak munasabah untuk si mati diberi satu lagi seluar hanya untuk digunakan sebagai bantal. Ini menunjukkan kealpaan terhadap potensi bahaya yang mungkin timbul (lihat perenggan 48 & 50).

(4) Alasan selanjutnya bahawa seluar tambahan tidak sepatutnya diberikan ialah kewujudan jeriji di siling lokap yang sepatutnya menimbulkan amaran. Defendan-defendan jelas terlepas pandang hal ini. Mereka sepatutnya mengambil langkah untuk mengelakkan pendedahan si mati kepada sebarang bahaya. Maka, defendan-defendan telah mencipta risiko bahaya dengan gagal mengambil langkah berhati-hati apabila membekalkan seluar kedua yang akhirnya digunakan untuk melakukan perbuatan maut tersebut. Dalam keadaan ini, defendan-defendan telah melanggar tugas berhati-hati mereka (lihat perenggan 52–53).

(5) Sekiranya pemantauan CCTV dilakukan secara berterusan, atau sekurang-kurangnya pada sela masa yang lebih singkat daripada sela masa setiap jam, si mati mungkin dapat diselamatkan. Pemantauan setiap jam menafikan tujuan pemasangan CCTV. CCTV dipasang untuk pemantauan berterusan, bukan hanya untuk disemak setiap jam. Ini tidak munasabah memandangkan saksi DW3 sudah pun melakukan rondaan berkala di lokap. Pemantauan CCTV sepatutnya melengkapkan rondaan fizikal. Kegagalan pemantauan teliti menyebabkan DW4 dan pegawai lain yang bertugas terlepas keseluruhan tindakan si mati sebelum membunuh diri (lihat perenggan 56–58).

(6) Defendan-defendan telah gagal mengambil langkah munasabah bagi mengelakkan kematian si mati. Terdapat pelanggaran jelas kewajipan apabila si mati berada dalam lokap dengan sepasang seluar tambahan serta kewujudan jeriji di siling, dan apabila risiko bunuh diri dalam kalangan tahanan bukanlah sesuatu yang tidak dapat dijangka. Ditambah pula dengan kekurangan pemantauan, defendan-defendan sepatutnya menyedari dan mencegah kejadian itu. Maka, defendan-defendan bertanggungjawab atas kecuaian (lihat perenggan 59–60).

(7) Defendan-defendan mempunyai tugas berhati-hati untuk memastikan si mati tidak mengalami kemudaratan semasa dalam tahanan mereka. Kematian si mati adalah peristiwa yang sepatutnya dielakkan di bawah kewajipan tersebut. Maka, defendan-defendan tidak boleh berhujah

A bahawa tindakan si mati memutuskan rantaian kausa. Perbuatan si mati bukan merupakan tindakan campur tangan bebas kerana ia berpunca daripada pelanggaran defendan (lihat perenggan 64).

(8) Mahkamah tidak diyakinkan dengan hujahan pembelaan bahawa B liabiliti harus dikadarkan kerana si mati bertanggungjawab atas tindakannya sendiri. Si mati berada dalam tekanan mental yang melampau akibat ditahan atas tuduhan pengedaran dadah dan menghadapi kemungkinan hukuman mati jika disabit. Ia adalah tidak wajar untuk menganggap si mati menanggung sebahagian kesalahan atas C kematiannya, terutamanya apabila kecuaian defendan-defendan sendiri memberi peluang kepadanya untuk membunuh diri. Jika tidak kerana kecuaian defendan-defendan, si mati tidak akan membunuh diri. Oleh itu, pembelaan kecuaian sertaan ditolak (lihat perenggan 65).

D (9) Berdasarkan pliding, rujukan kepada pelanggaran kewajipan berkanun hanya disebut secara samar. Undang-undang yang menjadi asas kewajipan tersebut tidak dinyatakan. Plaintif-plaintif terikat kepada pliding mereka dan tidak boleh membangkitkan perkara yang tidak diplidkan dalam hujahan. Plaintif-plaintif tidak boleh mengejutkan E pihak defendan dengan fakta yang tidak diplid. Oleh sebab itu, mahkamah enggan mempertimbangkan perkara ini kerana ia akan menyebabkan ketidakadilan kepada defendan yang tidak berpeluang menjawabnya melalui keterangan (lihat perenggan 67–68 & 70).

F (10) Tiada keterangan yang boleh dipercayai daripada kes plaintif sendiri untuk menyokong dakwaan salah laku dalam jawatan awam. Mengambil kira unsur-unsur tort tersebut, keterangan tidak menunjukkan sebarang asas kepada salah laku dalam jawatan awam. Maka, plaintif hanya berjaya membuktikan kes mereka atas asas kecuaian. Defendan-defendan, oleh G itu, diperintahkan membayar kepada plaintif-plaintif: (a) ganti rugi khas sebanyak RM6,370; (b) perbelanjaan pengebumian RM5,000; (c) ganti rugi kesedihan (kepada plaintif pertama sahaja) RM10,000; dan (d) kehilangan pendapatan sebanyak RM172,800 mengikut kadar 80:20 bagi manfaat plaintif pertama dan tiga orang anaknya, serta H plaintif kedua dan isterinya) (lihat perenggan 71, 74 & 88).

(11) Walaupun defendan pertama dan kedua bukan pelaku tort sebenar memandangkan tugas mereka tidak meliputi rondaan dan pemantauan terhadap si mati pada masa material, mereka merupakan pegawai atasan yang mempunyai kuasa terhadap kebajikan si mati. Defendan pertama, I sebagai Pengarah Maritim Negeri, bertanggungjawab terhadap keseluruhan operasi dan keselamatan pejabat maritim. Defendan kedua pula mempunyai kuasa terhadap si mati sebagai pegawai penyiasat. Oleh itu, kes ini melibatkan kegagalan sistemik yang mana pegawai atasan seharusnya dipertanggungjawabkan (lihat perenggan 75).]

Cases referred to

Alliance Connext Sdn Bhd & Anor v Wangsa Budimas Sdn Bhd [2022] 2 MLJ 154, CA (refd)

Ashley v Chief Constable of Sussex Police (Sherwood intervening); Ashley and another v Chief Constable of Sussex Police (Sherwood intervening) [2008] 2 WLR 975, HL (refd)

Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur [2006] 2 MLJ 137, HC (refd)

Caparo Industries plc v Dickman [1990] 2 AC 605, HL (refd)

Child N (claiming through her father) & Ors v Kerajaan Malaysia [2022] 1 MLJ 666, CA (refd)

Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal [2015] 1 MLJ 353, CA (refd)

Fadhelah bt Othman (administrator for the estate and dependant of Mohd Fadzrin bin Zaidi, deceased) v Mohamad Sukri bin Hat & Ors [2024] 11 MLJ 488, HC (refd)

Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals [2018] 3 MLJ 184, FC (refd)

Ketua Setiausaha Kementerian Dalam Negeri dan lain-lain lwn Ghaur Chandram a/l Murugesu (mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan sebagai bakal pentadbir sah harta pusaka Uthayachandran a/l Ghaur Chandram) dan satu lagi rayuan [2016] MLJU 1716; [2016] 3 CLJ 210, CA (refd)

Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor [2021] 3 MLJ 365; [2021] 4 AMR 529, FC (refd)

Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor [2015] 4 MLJ 734, FC (refd)

Muthammal a/l Rose Udayar & Anor v ACP A Paramasivam & Ors [2011] MLJU 1106; [2011] 2 AMR 214, HC (refd)

Reeves v Commissioner of Police of the Metropolis [2001] 1 AC 360, HL (folld)

Samuel Naik Siang Ting v Public Bank Bhd [2015] 6 MLJ 1, FC (refd)

Tan Wei Hong (a child suing through his guardian ad litem and next friend, Chuang Yin E) & Ors v Malaysia Airlines System Bhd & Ors [2017] 4 MLJ 540, CA (refd)

Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal [2018] 5 MLJ 561, FC (refd)

Legislation referred to

Civil Law Act 1956 ss 7, 7(3A), (3B), 8
Dangerous Drugs Act 1952 s 39B
Government Proceedings Act 1956 ss 5, 6
Prison Act 1995

Manoharan Malayalam (with P Subramaniam and Sarathbala Balakrishnan) (M Manoharan & Co) for the plaintiff.
Siti Syakimah bt Ibrahim (with Nuurzul Izzati bt Zulkipli) (Attorney General's Chamber) for the first, second and third defendants.

Alice Loke J:

INTRODUCTION

[1] The deceased died tragically by committing suicide whilst he was detained in the custody of the defendants. This suit, founded on negligence, breach of statutory duty and misfeasance in public office, is brought by the plaintiffs as administrators of the deceased's estate, his dependants as well as in their personal capacity.

BACKGROUND FACTS

[2] On 9 January 2019, at about 7.15am, some officers from the Maritime Enforcement Agency Malaysia ('MEAM') were patrolling the waters off the coast of the state of Selangor. At the material time, they were conducting a special operation, having received prior information about a particular boat which departed from the Sungai Belankan, Tanjung Rhu jetty.

[3] Upon keeping a lookout, they sighted the boat which was being driven in a suspicious manner. They gave chase. Shortly thereafter, they succeeded in apprehending the boat. On the boat was the deceased, Thinagaran a/l Madhavan and another person named Inthiran a/l Rajendran ('Inthiran'). They were promptly taken into custody. On their boat, some packages were found. These were later tested to be drugs.

[4] Both the deceased and Inthiran were produced before the Sepang Magistrate later at night for a remand order for the purpose of an investigation under s 39B of the Dangerous Drugs Act 1952. The magistrate ordered for both the detainees to be remanded for a period of seven days at the lock-up of the MEAM office in Klang, Selangor.

[5] Before the deceased was brought to the lock-up pursuant to the remand order, he complained of pain at the head region. Leftenan Maritim Norakma bt Hassan the second defendant, was the investigating officer of the case. She directed that the deceased be sent for treatment at the Hospital Tengku Ampuan Rahimah Klang. He was seen by a doctor and diagnosed to have stress headache and given medication for it. Subsequent to his treatment, he was brought to the MEAM building and placed in the same lock-up as Inthiran.

[6] Four days later, at about 6.30am on 13 January 2019, the lifeless body of the deceased was found hanging from the ceiling of the lock-up. He had used a pair of pants to hang himself. This attire was provided to him whilst he was in the lock-up. At the material time, the lock-up was monitored through a CCTV. The CCTV recording was tendered in evidence. Some of the photo shots of the CCTV recordings showing the critical moments of the deceased's actions were also adduced in evidence.

[7] Upon viewing the CCTV, it was found that the deceased had hung the pants from a grill on the ceiling. He then stepped on a partial concrete wall in the lock-up in order to hang himself from the pants.

[8] His body was sent to Hospital Tengku Ampuan Rahimah Klang for post mortem. The pathologist's findings were that the cause of death of the deceased was consistent with hanging.

[9] The plaintiffs were informed of the death of the deceased on the evening of the same day.

THE PARTIES

[10] The plaintiffs are the wife and father of the deceased respectively. The present action is brought in their capacity as dependants under s 7 of the Civil Law Act 1956, and also as co-administrators of the estate of the deceased under s 8 of the Civil Law Act 1956. Letters of administration were obtained on 20 August 2019. In addition, they have also brought this suit in their personal capacity.

[11] The first defendant was the Director of the Selangor MMEA office at the material time. He was in charge of the entire operations and security of the lock-up, particularly the implementation of lock-up procedures to ensure the safety of detainees.

[12] The second defendant was the investigating officer in respect of the crime the deceased was detained.

[13] The third defendant, the Government of Malaysia is cited as an employer vicariously liable for the actions and omissions of the first and second defendant, and other of its officers and servants pursuant to ss 5 and 6 of the Government Proceedings Act 1956.

A THE PLAINTIFFS' CLAIM

[14] The plaintiffs' claim against the defendants, is founded upon the tort of negligence, breach of statutory duty and misfeasance in public office. In relation to the cause of action in negligence, particulars of this claim have been set out in para 29 therein. The essence of their complaint is that the defendants owed a duty of care to ensure the safety of the deceased whilst he was in their custody. This they failed to do. Their failures are essentially as follows:

(a) failed to undertake the necessary supervision of the deceased at all material times;

(b) failed to regularly monitor the deceased through the CCTV;

(c) failed to ensure the lock-up was safe for the detention of the deceased; and

(d) put the deceased at risk of harm by providing him with a second pair of pants in the lock-up where there was a grill where it was foreseeable that the deceased would harm himself.

[15] There were numerous other particulars of negligence listed which were either too generally worded or which I do not consider relevant to the plaintiffs' case of negligence. For that reason, I have omitted to set them out here.

[16] In addition, the plaintiffs also claim that the defendants breached their statutory duty in failing to comply with the rules and law pertaining to the detention of the deceased in a lock-up. The office of the MEAM was not a designated lock-up at the material time.

[17] Finally, the plaintiffs allege misfeasance in public office on the part of both the first and second defendant, and servants of third defendant. They claim that the deceased was threatened and assaulted after his arrest as there were injuries found on the deceased which were allegedly caused by MMEA officers at the time of arrest. Whilst he was in custody, the defendants exhibited a reckless indifference as to the welfare of the deceased. Their cumulative actions caused the deceased to commit suicide.

[18] In view of the actions of the defendants, the plaintiffs now seek to be compensated in general, aggravated as well as exemplary damages.

[19] The evidence in support of the plaintiffs' case was adduced by the plaintiffs themselves. Their evidence in court was primarily on the issue of damages which I shall deal with in the later part of this judgment. Their case on liability against the defendants was sought to be established from the defence's oral and documentary evidence.

THE DEFENCE CASE

[20] The defendants deny all the allegations of negligence, breach of statutory duty and public misfeasance made against them. They contend that there was no duty of care owed to the deceased as his death was not foreseeable. Even if a duty of care was owed, they had taken all due measures to ensure the safety of the deceased.

[21] Further, even if the defendants were negligent, the deceased contributed to his death as it was due to his own actions. Finally, the defendants plead *novus actus interveniens* to contend that the deceased's death was independent of the actions of the defendants. His actions were the direct cause of his death. In the circumstances, no liability ought to be found against them in this particular instance.

[22] Five witnesses testified for the defence, including both the first and second defendants, in support of the defence case to refute the allegations of negligence, breach of statutory duty and misfeasance in public office. Their evidence can be summarised as follows.

[23] DW1 was the arresting officer. He testified as to the circumstances pertaining to the arrest. He observed there were injuries on the face and head of the deceased at the time of arrest. The deceased informed him that the injuries were sustained during the boat chase when he and Inthiran attempted to avoid arrest.

[24] DW2 the investigating officer (and also the second defendant), gave evidence as to her actions upon being handed the deceased by DW1. She noticed an injury at the back of deceased's head. Upon enquiring from DW1, he told her that the deceased injured himself whilst avoiding arrest. However, in view of his injury, she ordered for the deceased to be brought for treatment at the Klang Hospital before he was brought to the lock-up. After the deceased was detained at the MMEA office, she saw him on two consecutive days, 11 January 2019 and 12 January 2019. He appeared well and showed no indication of distress until she was informed on 13 January 2019 at 6.50am that he committed suicide. Upon such information she sent the body for a post mortem.

[25] DW3 was the officer in charge of security at the material time. He was on a 24-hour duty from 8am 12 January 2019 to the following day. His duty included supervising and patrolling the lock-up vicinity every two hourly, which he duly recorded in the log book. He did not observe anything untoward about the deceased. At 6am on 12 January 2019, the deceased was observed to be well.

[26] DW4 was on duty at the Pusat Operasi Maritim ('PUSOP') at the material time. PUSOP is housed in another block of the MMEA office, and located about 50meters from the lock-up. DW4's duties at PUSOP included monitoring the CCTV. The lock-up in which the deceased was placed had a CCTV. The CCTV monitors were located on the second floor of PUSOP.

[27] On 13 January 2019, DW4 monitored the CCTV at hourly intervals from 2am to 6am. The last time he observed the CCTV was at 6.15am. At that time, he observed the deceased to be sitting behind a partial wall in the lock-up. There was nothing untoward noticed. Shortly after, he was notified that the deceased had hung himself.

[28] DW5 is the first defendant himself. He was the Director of the MMEA Selangor at the material time, and was responsible for the entire operations of the office, including matters pertaining to security. He was aware of the deceased's arrest and detention. He personally saw the deceased on several occasions. He stated that the family of the deceased was allowed to see him whilst in detention. On 13 January 2019, at about 6.40am, he was notified about the deceased's suicide. He then viewed the CCTV and found the deceased to have used the extra pair of pants he was provided with, to hang himself.

ISSUES TO BE TRIED

[29] The determination of this case turns on both issues of law and fact. On the claim premised on negligence, the following issues fall to be decided:

(a) in view of the issue raised by the defence that his death was not foreseeable, whether a duty of care exists;

(b) whether the defendants were in breach of the duty of care;

(c) whether the defence of novus actus interveniens applies in the circumstances of this case; and

(d) whether the deceased was contributorily negligent.

[30] As for claim for breach of statutory duty and public misfeasance, this court will have to decide whether the evidence presented before this court supports the plaintiffs' case on these two causes of action.

[31] Finally, in the event liability is established on these causes of action, the appropriate award of damages to be made.

ANALYSIS AND FINDINGS OF THIS COURT

Negligence

[32] I shall deal with the claim on negligence first. The ingredients essential for a case in negligence was succinctly set out by the Court of Appeal in *Tan Wei Hong (a child suing through his guardian ad litem and next friend, Chuang Yin E) & Ors v Malaysia Airlines System Bhd & Ors* [2017] 4 MLJ 540 held as follows:

> [21] Perhaps, in order to better appreciate the issues raised by the parties, it is helpful to note briefly on the law of negligence. There are five distinct elements of negligence:
>
> (a) that the defendant had a obligation to the plaintiff to take care (ie he owed a duty of care to the plaintiff);
>
> (b) that the defendant should have observed a particular standard of care in order to fulfil or perform that duty;
>
> (c) that the defendant breached his duty of care by failing to fulfil or observe the relevant standard of care;
>
> (d) that the breach of duty caused harm to the plaintiff; and
>
> (e) that such harm was not too remote or unforeseeable such that the defendant is to liable for its occurrence (see *Fridman, Gerald Henry Louis, The Law of Torts in Canada, Vol I, Toronto, Carswell 1989,* at p 317).

[33] It is trite law that the first element to prove in a negligent action is the existence of a duty of care owed to a plaintiff. The defendants argue that they owe no duty of care to the deceased as it was not foreseeable that the deceased would commit suicide.

[34] The question whether a duty of care is owed in any given situation is one that is very much dependant on the factual situation. However, the law on the issue has now developed to what is referred to as the *Caparo* test, which gives valuable guidance on the consideration the court is to embark on.

[35] In *Lok Kok Beng & 49 Ors v Loh Chiak Eong & Anor* [2015] 4 MLJ 734, the Federal Court held at p 752:

> To put it in a nutshell the preferred test is the three-fold test, where the requirements of foreseeability, proximity and policy considerations must exist in any claim for negligence. The three-fold test has been recognised by the House of Lords in *Caparo Industries plc v Dickman* [1990] 2 AC 605, as the elements giving rise to a duty of care. In the judgment of Lord Bridge in *Caparo* at pp 617–618, His Lordship said that:
>
> > What emerges is that, in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist

A between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other.

B The most difficult ingredient to prove in establishing a duty of care is the requirement of sufficient proximity between the claimant and the defendant. The court would have to look at the closeness of the relationship between the parties and other factors to determine sufficient proximity based on the facts and circumstances of each case. These factors are likely to vary in different categories of cases.

C

[36] The *Caparo* test was re-affirmed by the Federal Court in *Tenaga Nasional Malaysia v Batu Kemas Industri Sdn Bhd and another appeal* [2018] 5 MLJ 561.

D

[37] Reverting to the facts of this case, as a detainee, the deceased was in the custody and care of the defendants and/or their officers. He had been detained pursuant to a remand order obtained by the investigating officer. His liberty was curtailed for the duration of the remand period. His movements were under the control and close supervision of the defendants. In view of this, I find E that the ingredient of sufficient proximity of relationship has been established to give rise to a duty of care.

[38] By way of illustration, in *Ketua Setiausaha Kementerian Dalam Negeri* F *dan lain-lain lwn Ghaur Chandram a/l Murugesu (mendakwa bagi pihak diri sendiri dan kesemua orang tanggungan sebagai bakal pentadbir sah harta pusaka Uthayachandran a/l Ghaur Chandram) dan satu lagi rayuan* [2016] MLJU 1716; [2016] 3 CLJ 210 (CA), the Government and its officers were held liable in negligence when the deceased, a prisoner at the Sungai Buloh prison, died G from a fight which ensued during food distribution. The defendants were held liable in failing to prevent his death.

[39] Imposing a duty of care to prevent harm by third parties on account of a detainee being in the custody and care usually presents no difficulty. The H situation is however, less straightforward when the harm is inflicted by the deceased himself. It is in this scenario that the defendants argue as it was unforeseeable that the deceased would commit suicide, no duty of care ought to be imposed.

I **[40]** I am of the view that the duty of care on the part of the defendants to take reasonable care of the deceased extends not only to preventing harm caused by third parties, but by the deceased inflicting self-harm.

[41] In this regard, the House of Lords case of *Reeves v Commissioner of Police*

of the Metropolis [2001] 1 AC 360 is particularly instructive. In *Reeves*, the deceased was remanded on charges of credit fraud and for handling stolen vehicles. He had made two previous attempts at suicide. As a suicide risk, he was frequently observed. However, the defendant's officers were negligent by inadvertently leaving the flap of the cell door open, which allowed the deceased to tie his shirt through the spy hole on the outside of the door and hang himself.

[42] The House of Lords had no hesitation in finding a duty of care to exist. Lord Hope held:

> In my opinion, it is necessary at the outset to identify the duty which was owed to the deceased by the commissioner. There is no doubt that the commissioner was right to concede that he owed a duty of care to the deceased while he remained in police custody. The deceased had been identified as a suicide risk, having on two previous occasions attempted to strangle himself with a belt after being placed in a cell. It was the commissioner's duty to take reasonable care not to provide him with the opportunity of committing suicide by making use of defects in his cell door. The risk was not that he would injure himself accidentally if given the opportunity, but that he would do so deliberately. That is the nature of an act of suicide by a person who is of sound mind. It is a deliberate act of self-destruction by a person who intends to end his own life. So I think the commissioner's duty can most accurately be described as a duty to take reasonable care to prevent the deceased, while in police custody, from taking his own life deliberately.
>
> ...
>
> As a general rule, the common law duty of care is directed towards the prevention of accidents or of injury caused by negligence ...
>
> ...
>
> But the duty of care may sometimes extend to preventing people from injuring themselves deliberately.
>
> ... the situation which may arise where a person who is of sound mind is deprived of this liberty and put in prison or detained in custody by the police. The duty of those who are entrusted with his custody is to take reasonable care for his safety while he remains in their hands. If it is known that he may engage in self-mutilation or suicide while he is in their custody, their duty is to take reasonable care to prevent him from engaging in these acts so that he remain free from harm until he is set a liberty. This duty is owed to the prisoner if there is that risk, irrespective of whether he is mentally disordered or of sound mind. It arises simply from the fact that he is being detained by them in custody and is known to be at risk of engaging in mutilation or of committing suicide.

[43] Another of the Law Lords, Lord Hoffman held:

> The police and prison authorities have long been aware that prisoners are more than usually likely to attempt suicide or self-injury ... The risk of suicide is particularly high among prisoners on remand facing a new environment and an uncertain future.

A The duty, as I have said, is a very unusual one, arising from the complete control which the police or prison authorities have over the prisoner, combined with the special danger of people in prison taking their own lives.

B **[44]** To reiterate, in *Reeves* the existence of duty of care not in issue. The passages set out above made it clear that a duty of care exists when a person is in the custody of another. It is therefore not open for the defendants to argue that a duty of care was owed to the deceased at the material time.

C **[45]** Defence counsel referred to the above case and sought to distinguish *Reeves* in that the deceased was a known suicide risk and therefore a duty of care was imposed on the defendant. There had a previous history of attempted suicide. I am of the view that the facts are barely distinguishable. Judicial notice can be taken of the fact that persons in custody are susceptible to mental stress from being in custody. They are vulnerable to depression and hence suicidal impulses is not unforeseeable. The deceased here was arrested and detained for investigation into a drug trafficking offence. One can expect him to be under extreme mental distress from the fact of being detained for a capital offence. It was not unforeseeable that he would be a suicide risk.

D

E **[46]** Closer home, the case of *Fadhelah bt Othman (administrator for the estate and dependant of Mohd Fadzrin bin Zaidi, deceased) v Mohamad Sukri bin Hat & Ors* [2024] 11 MLJ 488 demonstrated the court's readiness to hold that a duty of care is owed to persons in custody and such duty includes the duty to ensure the safety of the person in custody and to ensure that they do not harm themselves or commit suicide.

F

G **[47]** Having determined that a duty of care exists, the next question to consider is whether the defendants breached the duty. Returning to the facts of this case, the deceased hung himself from the grill on the ceiling using the extra pair of pants he was provided with. In other words, the grill and the pants provided the very means by which he harmed himself. The crucial question to consider is whether the defendants were negligent in providing an opportunity for the deceased to harm himself.

H **[48]** It was in evidence that when the deceased was placed in the lock-up, he was provided with two pairs of pants. One was for him to wear, and the other was a spare. The officers on duty noticed that he used the spare pants as a pillow.

I **[49]** The first defendant was cross-examined as to the Standard Operating Procedures ('SOP') applicable to detainees. He stated that in handling detainees, MEAM is governed by their SOP and the Director General's Standing Orders. However, he admitted in cross-examination that whilst the provision of attire was stated in the SOP, the requisite number was not stated.

[50] I find that it was negligent on the part of the defendants to have provided him the spare pants. Whilst pants as an attire and ordinarily innocuous and harmless, it has the potential of being dangerous when provided to a detainee. The defendants were obviously not alert to the possibility of this piece of clothing being used by the deceased to harm himself. DW3 stated that the deceased had used it as a pillow. It is unfathomable for the deceased to be provided with another set of pants only to be used as a pillow. It would appear that there was a careless disregard of the potential harm to which this attire could be put to.

[51] DW5 (first defendant) in his evidence said that prior to being placed in the lock-up, a detainee would be thoroughly checked to ensure that weapons or instruments likely to cause harm is not present on his person. Having taken precaution in this aspect, he failed to consider the other aspect of security when the deceased was provided with an item which was capable of harm.

[52] The accused hung the extra pair of pants from a grill that was on the ceiling. DW5 in his evidence stated that the grill was installed as there was a previous escape by a detainee. Unfortunately, the grill and the pants became the very means for the deceased to harm himself. There is a further reason not to have provided the deceased with the extra pair of pants. The presence of a grill ought to have raised a red flag. The defendants obviously overlooked this. They should have taken steps to avoid exposing the deceased to any danger.

[53] I therefore find that the defendants created the risk of harm to the deceased. They failed to take reasonable care by providing him with the second pair of pants which then gave him the opportunity to commit the fatal act. In the circumstances, I have no hesitation in finding the defendants to have breached their duty of care.

[54] There is also another aspect of their duty in which the defendants failed. A CCTV was installed which allowed monitoring of the lock-up. The monitoring was done from another building which housed the PUSOP. At the material time, DW4 was on duty at the PUSOP together with two other officers. The CCTV was viewed hourly. He stated that he last viewed the CCTV at around 6.15am. The deceased was alive then.

[55] The CCTV recording was played during the trial. It would show that at 6.05am to 6.52am the deceased was awake and appeared restless. He was seen to be intermittently moving between various positions. Between this time, he was found sitting behind and on the partial wall, on the floor, holding the grill and looking out of the cell. It was around 6.55am that his intentions became

more obvious when he climbed on the partial wall and sat there. At around 7.02am, he stood up on the wall to hang the pants and hung himself shortly thereafter.

[56] In my view, had there been continuous monitoring of the CCTV, or at the very least at shorter intervals than the hourly intervals, the deceased could have been prevented from carrying out the suicide.

[57] The lack of closer monitoring caused DW4 and those on duty with him to miss the entire actions of the deceased just prior to his suicide. DW4 attempted to explain the neglect by stating that the monitoring was required to be done only hourly. In other words, if he had viewed the CCTV at 6.15am as he stated, the next time he was obliged to do so would have been 7.15am.

[58] Monitoring at hourly intervals defeats the purpose of having a CCTV. To my mind, it is installed for continuous monitoring. It made no sense to view the CCTV only hourly as DW3 was already conducting regular patrolling of the lock-up. Although DW5 stated that patrolling was expected to be done two hourly, DW3 in his evidence said that he patrolled the lock-up every 30–40 minutes. The CCTV monitoring must therefore supplement the regular patrolling. To my mind, had there not been a lapse in the CCTV monitoring, the deceased's death could have been prevented.

[59] Upon considering the totality of the evidence, I find the defendants to have failed in taking reasonable care to prevent the death of the deceased. There is a clear breach of duty when the deceased was with an extra pair of pants in the presence of a grill in the lock-up and where the risk of suicide is not unforeseeable with detainees. Coupled with this is the lack of monitoring which could have prevented the deceased from successfully carrying out his intention to commit suicide.

[60] In the circumstances, the defendants are liable in negligence.

Defences of novus actus interveniens and contributory negligence

[61] The defendants contend that the deceased's death was not caused by their negligence but by the voluntary act of the deceased. This act broke the chain of causation between the defendants' breach and the death.

[62] When the defence of *novus actus interveniens* is raised, the court will have to consider whether the act of the deceased is attributable to some independent act or event which supersedes the tortious conduct. Putting it another way, the *novus actus interveniens* must constitute an event of such

impact that supersedes the wrongdoing of the defendant by breaking the chain of causation.

[63] The same argument was advanced in *Reeves* case and it did not find favour with the House of Lords. The relevant portion of the judgment reads:

> ... *novus actus interveniens* 'must constitute an event of such impact that it rightly obliterates the wrongdoing of the defendant'. The reference to an independent act superseding the effect of the tortious conduct must, in my view, relate to an act which was outside the contemplated scope of events to which the duty of care was directed. Where such a duty is specifically directed at the prevention of the occurrence of a certain event I cannot see how it can be said that the occurrence of that event amounts to an independent act breaking the chain of causation from the breach of duty, even though it may be unusual for one person to come under a duty to prevent another person deliberately inflicting harm on himself.

[64] In this case, the defendants were under a duty of care to ensure the deceased came to no harm whilst in their custody. His death was the very event their duty was directed at. It is not therefore open to the defendants to contend that the actions of the deceased broke the chain of causation. The act of the deceased did not constitute an independent intervening act as it flowed from the breach of the defendants.

[65] The defence further submit that liability ought to be apportioned as the deceased ought to be responsible taking his own life. However, I am not persuaded that liability ought to be apportioned. The deceased was in a position of extreme mental stress as he was detained for alleged drug trafficking and faced the possibility of the death penalty, if convicted. It would be unconscionable to expect the deceased to bear some part of the blame for his death especially when the defendants own actions afforded him an opportunity to take his own life. But for the defendants' negligence, the plaintiff would not have committed suicide. I therefore reject the defence of contributory negligence.

Breach of statutory duty

[66] The defendants plea of breach of statutory duty, if it can be considered so, appears to be found in para 31 of its statement of claim. The paragraph reads:

> 31. Secara tambahan kepada perkara yang telah diplidkan di atas, Plaintif-Plaintif juga memplidkan bahawa Defendan-Defendan, pekerja-pekerja, pengkhidmat-pengkhidmat dan/atau agen-agen Defendan-Defendan telah gagal, enggan dan/atau cuai dan/atau secara sengaja telah gagal, enggan dan/atau cuai untuk mematuhi peruntukan-peruntukan dalam undang-undang sedia dan juga

A undang-undang lazimnya yang ada bagi menjaga, mengawal, mengawas, menyelia, mengurus serta memberi pertolongan dan perlindungan kepada simati, Plaintif-Plaintif dan keluarga amnya.

B **[67]** From the above pleading, there is at best, a vague reference to breach of statutory duty. The law upon which the duty was said to arise was not mentioned (see: *Asia Pacific Land Bhd & Ors v Datuk Bandar Kuala Lumpur* [2006] 2 MLJ 137). However, in the written submissions of counsel for the plaintiffs, the alleged breach of statutory duty was elaborated on. The plaintiffs contend that the detention of the deceased in MEAM's lock-up was in C contravention of the Prison Act 1995 in that the lock-up the deceased was detained must first be *gazetted* a place for the confinement of persons.

D **[68]** I consider the fact of *gazettement* to be material and must be pleaded in order to afford an opportunity for the defendants to respond. The defendants justifiably submitted that the plaintiffs are bound by their pleadings and ought not to be allowed to raise an unpleaded point in submission. I agree.

E **[69]** The law on this is trite. In *Samuel Naik Siang Ting v Public Bank Bhd* [2015] 6 MLJ 1, the Federal Court held:

> It is a cardinal rule in civil litigation that parties are bound by their pleadings and are not allowed to adduce facts and issues which they have not pleaded (see *State Government of Perak v Muniandy* [1986] 1 MLJ 490; and *Anuar bin Mat Amin v Abdullah bin Mohd Zain* [1989] 3 MLJ 313). In *Blay v Pollard & Morris* [1930] F 1 KB 628, Scrutton LJ ruled that: 'Cases must be decided on the issues on the record; and if it is desired to raise other issues there must be pleaded on the record by amendment'.
>
> The Supreme Court in *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, had G also emphasised the importance of pleadings and ruled that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal (see also *AmBank (M) Bhd (formerly known as Arab-Malaysia Bank Bhd) v Luqman Kamil bin Mohd Don* [2012] 3 MLJ 1 (FC)). On the same issue, HRH Raja Azlan Shah FJ (as HRH then was) in *The Chartered Bank v Yong Chan* [1974] H 1 MLJ 157, had also pointed out that 'as the trial judge had decided on an issue which was not raised in the pleadings, the judgment must be set aside and new trial ordered' (see also *Haji Mohamed Dom v Sakiman* [1956] 1 MLJ 45; and *Kiaw Aik Hang Co Ltd v Tan Tien Choy* [1964] 1 MLJ 99).

I **[70]** The plaintiffs cannot be allowed to take the defendants by surprise on an unpleaded fact. For this reason, I have refrained from considering this point as it would be tantamount to a denial of justice to the defendants who were not allowed to respond by evidence led on their behalf.

Misfeasance in public office

[71] The plaintiffs have also premised their case on misfeasance in public office. Again, combing through their statement of claim, I find a vague reference to this tort in para 51 in the claim for exemplary damages when the plaintiffs pled the grounds to substantiate their claim for exemplary damages. However, these same reasons were relied upon in their claim for negligence. Notwithstanding the inadequacy in the pleadings, I shall nonetheless deal with this cause of action.

[72] For a claim in public misfeasance to succeed, the requisite elements have been explained in *Datuk Seri Khalid bin Abu Bakar & Ors v N Indra a/p P Nallathamby (the administrator of the estate and dependent of Kugan a/l Ananthan, deceased) and another appeal* [2015] 1 MLJ 353 (CA) where it was held:

> [33] To sustain a claim of public misfeasance, what the plaintiff is required to prove is as set-out in the case of *Three Rivers District Council v Bank of England* [2003] 2 AC 1; [2000] 2 WLR 1220 which are as follows:
>
> (a) the act complained of had been committed by a public officer purportedly pursuant to his exercise of his public power;
>
> (b) the act committed must be done with malice which Lord Steyn in *Three Rivers* explained as follows:
>
> > First there is the case of targeted malice by a public officer, ie, conduct specially intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is unlawful.
>
> (c) that there is proximity between the deceased and the defendants giving rise to the plaintiff a legal standing to sue; and
>
> (d) that the acts of the defendants had caused material damage to the deceased.

[73] The plaintiffs sought to establish, from the cross-examination of the defence witnesses, a case of assault at the time of arrest, denied/neglect in the provision of food and inhumane treatment in the lock-up cell, as well as being subject to threats by one MEAM officer. Raising facts and allegations in cross-examination is not equivalent to adducing evidence from a party itself. I find no credible evidence from the plaintiffs own case to substantiate the allegations raised in cross-examination. All the allegations were denied by the defence witnesses. The plaintiffs could have called the medical doctor from the Klang Hospital who examined the deceased after his arrest to establish a case of assault at time of arrest. It is a well-established principle that there is no

property in a witness (see: *Alliance Connext Sdn Bhd & Anor v Wangsa Budimas Sdn Bhd* [2022] 2 MLJ 154 (CA)). Bearing in mind the ingredients of the tort of misfeasance in public office, I do the evidence do not even suggest remotely a case of misfeasance in public office.

[74] In the result, I find on a balance of probabilities, the plaintiffs to have succeeded only in establishing their case in negligence.

[75] For the sake of completeness, I will also add that the first and second defendants, whilst they were not the actual tortfeasors as their duties did not include patrolling and monitoring the deceased at the material time, they were superior officers who had authority over the well-being of the deceased. The first defendant stated in his evidence that as the State Maritime Director, he was responsible for the entire operations and security of the maritime office. The second defendant had authority over the deceased as she was the investigating officer. This is a case of systemic failure, as revealed by the evidence, for which the superior officers are to held responsible (see: *Muthammal a/l Rose Udayar & Anor v ACP A Paramasivam & Ors* [2011] MLJU 1106; [2011] 2 AMR 214).

[76] I note that in this case, the defence did not raise any objections to the first and second defendants being cited as tortfeasors.

Damages

[77] I shall now deal with the issue of damages, starting with the claim for special damages. It is trite law that special damages must be strictly proved (see: *Child N (claiming through her father) & Ors v Kerajaan Malaysia* [2022] 1 MLJ 666).

[78] Having perused the pleaded special damages, I find them to the following to have been reasonably incurred and I allow as follows:

(a)	cost of extracting letters of administration	RM5,850
(b)	post mortem report	RM500
(c)	police report	RM20
		RM6,370

[79] The plaintiffs have made a claim on behalf of the dependents under s 7 of the Civil Law Act 1956 ('the CLA'). The dependents are as listed in para 34 of the statement of claim. The law on s 7 has since been amended with effect from 31 May 2019. However, as the cause of action arose before the date of coming into force of the amending Act, the claim for bereavement is only for the benefit of the first plaintiff as the spouse, for the amount of RM10,000 and

I so allow (see: s 7(3A) and (3B) of the CLA). A

[80] As for the loss of earnings, the first plaintiff ('PW1') testified that the deceased was working as a security guard at the material time with a monthly salary of RM1,000. A letter of offer from Delta Force Security Services & Consultancy Sdn Bhd was adduced in evidence. The contents state that the deceased was to receive a monthly salary of RM1,000 with effect from 1 February 2018. The second plaintiff ('PW2') confirmed this in his evidence. In addition, PW2 stated that his son was also working as a part-time fisherman using the fishing boat belonging to PW2 to supplement his income. He estimated the deceased's earnings from his part-time job to be about RM1,800 per month. B C

[81] The EPF statement of the deceased was also adduced in evidence to show a balance of RM7,057.14 and a contribution by his employer of RM130 for the month of January 2019. D

[82] I am satisfied on the documentary evidence that the deceased was gainfully employed at the material time. Although the evidence of a salary slip would provide more certainty as to the amount he was receiving. Considering the circumstances of the plaintiffs, it would be too optimistic to expect good record keeping. Although the plaintiffs claim that the deceased was contributing an amount of RM2,200 per month towards his dependants, I do not find the evidence of this fact. However, bearing in mind that the deceased had three children at the material time with aging parents to support, I find an amount of RM1,200 to be reasonable contribution to his dependents. E F

[83] The deceased was 31 years of age at the material time. His years of purchase would be 12 ((55–31)/2). Applying the multiplicand of RM1,200, the amount for loss of earnings would be RM172,800. As there are six dependents listed, comprising of the first plaintiff and her three children and the second plaintiff together with his wife, it necessary to apportion the amount of RM172,800 in the ratio of 80:20, for these two groups of dependants. G H

[84] A dependency claim under s 7 of the CLA also allows for funeral expenses. I consider an amount of RM5,000 to be reasonable and I so award.

[85] Apart from the dependancy claim, the plaintiffs have also made a claim for general damages of RM500,000 (para 52(3) of the statement of claim), presumably for misfeasance in public office. In view of my finding that the tort was not proved, damages does not arise. Further, this claim was also not addressed in the submissions by counsel, and I would regard the claim as abandoned. For these reasons, the claim is not allowed. I

[86] As for the plaintiffs claim for aggravated damages of RM500,000, there is no merit for this claim. The plaintiffs' claim is allowed on the cause of action of negligence only. There was no evidence of egregious conduct on the part of the defendants to warrant an award of aggravated damages (see: *Ashley v Chief Constable of Sussex Police (Sherwood intervening); Ashley and another v Chief Constable of Sussex Police (Sherwood intervening)* [2008] 2 WLR 975; and *Koperal Zainal bin Mohd Ali & Ors v Selvi a/p Narayan (joint administrator and dependant of Chandran a/l Perumal, deceased) & Anor* [2021] 3 MLJ 365; [2021] 4 AMR 529 (FC)). There was also no evidence that the conduct of the defendants caused the plaintiff to suffer additional mental distress beyond what is normal arising from the death of the deceased.

[87] Finally, the claim for exemplary damages of RM500,000 is also not allowed. The law as to the award of exemplary damages in a dependency claim and estate claim has since been settled in *Ketua Polis Negara & Ors v Nurasmira Maulat bt Jaafar & Ors (minors bringing the action through their legal mother and next friend Abra bt Sahul Hamid) and other appeals* [2018] 3 MLJ 184 (FC). The Federal Court held that damages under s 7 was intended to be compensatory in nature. An award of exemplary damages under s 7 of the Act was clearly contrary to the legislature's intention in enacting that section. As for the claim for exemplary damages, s 8 of the Act clearly prohibits such an award. In any event, the submissions of learned counsel did not pursue the claim for exemplary damages.

CONCLUSION

[88] For the reasons as aforesaid, the plaintiffs' claim in negligence is allowed. I also order that the defendants are to pay the plaintiffs the following amounts:

(a) special damages RM6,370;

(b) funeral expenses RM5,000;

(c) bereavement (first plaintiff only) RM10,000; and

(d) loss of earnings RM172,800; (in the proportion of 80:20, for the benefit of the first plaintiff and her three children, and second plaintiff and his wife respectively)

[89] Finally, I also order that costs of the action of RM30,000 be paid by the defendants to the plaintiffs.

Plaintiffs' claim allowed in part.

Reported by Nabilah Syahida Abdullah Salleh